FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

ZAC A. CRITTENDEN, JR., d/b/a CRITTENDEN TRACTOR COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent and amicus curiae National Farm & Power Equipment Dealer's Association rely alternatively on the Model Uniform Commercial Code (Resp. Br. 18–22; Amicus Br. 8–12) and on state law (Resp. Br. 22–29; Amicus Br. 13–17) as bases for upholding the decision of the court of appeals. That court, however, adopted neither of these theories. Rather, it used pieces of both of them, spliced together with a piece of the Federal Tax Lien Act of 1966 (see our main brief at 25–32). The attempt to recast the court's holding should be rejected, since neither state law nor the

Model U.C.C. provides a better standard than the clear and settled rule of first in time, first in right.

a. While amicus urges "a federal rule incorporating the applicable state law on relative lien priorities" (Br. 17) without mentioning what the applicable state law might be in this case, respondent argues at some length (Br. 22–29) that under Georgia law its repairman's lien in the tractor is superior to the prior-in-time lien of the Farmers Home Administration (FHA). This is a "state law quagmire" which the court of appeals elected to avoid, deciding that it would fashion a rule of federal common law instead (Pet. App. 26a n.17). This Court, we submit, should likewise avoid entanglement with this question of Georgia law. See, *e.g., Bishop* v. *Wood,* 426 U.S. 341, 345–346 (1976).[1]

Apart from the complexity of the question and the fact that the court of appeals did not decide it, a priority rule for federal contractual liens that turned on the particular law of each state would defeat the basic purpose of uniformity that counsels application of a federal rule in this area in the first place. See *Clearfield Trust Co.* v. *United States,* 318 U.S. 363,

[1] If the Court does reach the question, we submit that the court of appeals was correct in leaning to the view (Pet. App. 26a) that, by virtue of Ga. Code Ann. § 109A–9–310 (1973) (quoted in our main brief at 27 n.24), the superpriority claimed by respondent does not exist under Georgia law. The reenactment in 1972 of Ga. Code Ann. § 67–2003 (Supp. 1977) did not work a repeal of § 109A–9–310 by implication, as respondent claims (Br. 23–29); § 67–2003 is not part of the Georgia U.C.C., as § 109A–9–310 is, and the reenactment of § 67–2003 was evidently motivated by the addition of its provision concerning storage liens, which is irrelevant to the subject of repairmen's liens.

367 (1943). The court of appeals recognized this purpose (Pet. App. 12a), and this Court has pointed out that the first-in-time rule "is believed to be universal" (*Rankin* v. *Scott,* 25 U.S. (12 Wheat.) 177, 179 (1827)) and "is widely accepted and applied, in the absence of legislation to the contrary." *United States* v. *City of New Britain,* 347 U.S. 81, 85 (1954). Following state law would also mean, in cases where the state awards superpriority to repairmen's liens, abandoning a rule that this Court has viewed as a matter of fundamental fairness to prior lienholders (see our main brief at 15–16) in favor of one about which there is substantial disagreement (see *id.* at 21 n.19, 27 n.24, and generally 19–25). And it would mean that vested federal interests would be divested by later-arising liens, although Congress has not authorized this charge on federal funds. Thus, even if respondent were correct about what the law of Georgia provides, this Court should reject the invitation to abandon the first-in-time rule in favor of a new federal rule of lien priorities incorporating the differing rules of particular states.[2]

[2] Respondent's departure from the rationale of the court of appeals is emphasized by its requests for affirmance of the *district court's* decision (Resp. Br. 15–16, 22, 29). The district court accorded priority to the total amount of respondent's repairman's lien, while the court of appeals disallowed priority for the portion of the repair bill incurred prior to the tractor's last possession by respondent (Pet. App. 32a–35a). Since respondent did not cross-petition from the court of appeals' decision, the priority of the lien for the earlier repair bills is not before this Court. See, *e.g., Alaska Industrial Board* v. *Chugach Electric Association,* 356 U.S. 320, 324–325 (1958); *LeTulle* v. *Scofield,* 308 U.S. 415, 421–422 (1940).

b. Just as a rule based on state law may not be successfully invoked to support the decision below, neither may a rule based on the Model U.C.C. The reason is, at bottom, the same. The only provision of the Model U.C.C. that relates to repairmen's liens is Section 9–310 (1972 ed.).[3] This provision—which Georgia has not adopted[4]—does not contain a complete priority rule. Rather, it refers the reader back to state law to determine whether that law expressly provides that a statutory repairman's lien is not superior to a prior perfected security interest. (Contrary to amicus's claim about "virtually every state" (Br. 4), statutes in a number of states—like § 109A–9–310 in Georgia (see note 1, *supra*)—do expressly deny the superpriority to which U.C.C. 9–310 refers. See the authorities cited at page 27 n. 24 of our main brief.) Reliance on the Model U.C.C. thus requires reliance on state law after all, with all the defects of that approach.

It was pursuant to U.C.C. 9–310 that the court of appeals here first looked to Georgia law, found it unclear at best and probably unfavorable to respondent's claim (Pet. App 26a & n.17), and thereupon decided to fashion a federal rule which would give the repair-

[3] It provides:

"When a person in the ordinary course of his business furinshes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise."

[4] One reason why the U.C.C. is unsuitable as a model for a federal rule is that different states have different versions of it.

man priority even if Section 9–310 and state law commanded a different result—"even if the state statute creating the mechanic's lien provided that the lien was not superior to prior perfected security interests" (Pet. App. 32a n.20). Thus, in the end the court rejected a crucial part of the Model U.C.C. approach that respondent and amicus would have this Court adopt. And in the process the court demonstrated that the Model U.C.C., because it incorporates state law, would not provide a uniform and predictable priority rule.[5]

In sum, once the courts decide to abandon the first-in-time rule as the fundamental standard for the federal common law of lien priorities, neither the U.C.C. nor the law of the states provides a more acceptable result than the kind of judicial pastiche produced by the court of appeals here. If modifications of the first-in-time rule are desirable, Congress is the only body that can make them with the certainty, the predictability, and the policy decisions that are required.

2. Respondent and amicus contend (Resp. Br. 16–17; Amicus Br. 11–12) that because the FHA has provided by regulation that purchase money security interests take priority over earlier-arising FHA liens

[5] As the First Circuit noted in rejecting the approach taken by the court below, "[r]ecourse to the local law governing mechanics' liens * * * would incorporate many local eccentricities." *Chicago Title Insurance Co.* v. *Sherred Village Associates*, 568 F. 2d 217, 222 (1st Cir. 1978) (footnote omitted), petition for cert. pending *sub nom. Hercoform, Inc.* v. *Chicago Title Insurance Co.*, No. 77–1611.

(7 C.F.R. 1921.106), the agency has "recognize[d] the demise of the inchoateness and first in time doctrines" (Amicus Br. 12). In the interest of consistency, they argue, the FHA must also accord superpriority to respondent's possessory lien for repairs.

But priority for purchase money mortgages is not necessarily inconsistent with the first in time and choateness doctrines. Under case law applying the choateness requirement in the context of tax liens prior to the 1966 Federal Tax Lien Act (26 U.S.C. 6323), it was "generally * * * held that [purchase money mortgages] are protected whenever they arise. This is based upon the concept that the taxpayer has acquired property or a right to property only to the extent that the value of the whole property or right exceeds the amount of the purchase money mortgage." H.R. Rep. No. 1884, 89th Cong., 2d Sess. 4 (1966). If title to the chattel secured by a purchase money mortgage passes to the purchaser only to the extent of his equity, property to which the federal lien can attach may be limited to that equity. See also Rev. Rul. 68–57, 1968–1 Cum. Bull. 553; Uniform Commercial Code Section 9–312 and Comment (1972). The FHA regulations follow this view of purchase money security interests, giving them priority from the time they arise, provided that they are promptly perfected in the manner set forth in the regulations. 7 C.F.R. 1921.106.

But even if this conceptual basis for the regulations did not exist, the FHA could, as a matter of policy,

distinguish for priority purposes between purchase money security interests and repairmen's liens. The Secretary of Agriculture is authorized to subordinate FHA liens in appropriate circumstances. 7 U.S.C. 1981(d), as amended by Pub. L. No. 95–334, Section 121, 92 Stat. 427. He might well conclude that purchase money mortgages warrant priority over earlier-arising FHA liens while repairmen's liens do not, if only because there is substantial disagreement about the merits of superpriority for repairmen's liens. See our main brief at 22 n.19, 27 n.24.

3. Respondent and amicus point to instances where FHA regulations direct agency personnel to follow state law (Resp. Br. 19–20; Amicus Br. 13–16), and they conclude that, to be consistent, the agency should also follow state law with respect to lien priorities.

The regulations in question, however, deal primarily with housekeeping matters such as filing requirements and forms. The United States is not relinquishing any property interest if it follows these state requirements, which promote the convenience of all parties. It is reasonable for the agency to direct its staff to comply with state law on these matters.[6] State laws according superpriority to competing non-federal liens, in con-

[6] Amicus observes (Br. 13) that the FHA follows state law in determining who is the owner of real property. This practice is consistent with decisions of this Court applying state law to determine whether property is owned by the taxpayer, while rejecting state law insofar as it sets the relative priorities of federal tax liens and other liens. *Aquilino* v. *United States*, 363 U.S. 509, 513–514 (1960).

trast, undercut vested federal property interests. It is equally reasonable for the agency to decline to accede to these statutes that would occasion financial losses to the federal government and to FHA programs in particular.[7]

4. Finally, respondent and amicus complain (Resp. Br. 11–12; Amicus Br. 7–8) that the realities of the repairman's business make it impossible for him to protect himself if the first-in-time doctrine is applied, and that as a consequence borrowers from the FHA will have great difficulty in finding anyone who is willing to repair their equipment. We doubt that the elaborate procedures respondent envisions (Br. 12) would be necessary to protect the repairman.[8] Equipment repairs apparently continue to be made in the many states that do not accord a superpriority to repairmen's liens (see our main brief at 27 n.24). Amicus, which has "31 affiliated associations represent[ing] 10,325 dealers in the 48 contiguous states" (Br. 2), makes no claim that any of these dealers experience difficulties, or even notice the difference, in the states that deny superpriority. One may infer

[7] Amicus apparently asserts (Br. 6) that 7 C.F.R. 1930.44 subordinates FHA liens that would have priority under the choate lien doctrine. That section, however, merely recognizes that even under the choate lien doctrine, some liens will be superior to the FHA lien; it provides for the payment of such prior liens, in those instances where the FHA is custodian of the proceeds of a nonjudicial liquidation sale.

[8] Respondent questions (Br. 11) our statement (Brief for United States at 20–21 & n.18) that the FHA can subordinate its lien to a repair lien. This is expressly authorized in the case of "major repairs and parts" by 7 C.F.R. 1930.30(b).

that, as a practical matter, satisfactory accommodations are made between the interests of repairmen and of secured lenders. To the extent that this may not be the case, a remedy is available in Congress.

CONCLUSION

For the foregoing reasons and the reasons given in our main brief, the judgment of the court of appeals, to the extent it awards respondent priority, should be reversed.

Respectfully submitted.

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